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No. 05-259

In the
Supreme Court of the United States

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Petitioner,

v.

SHEILA WHITE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~ BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.3(b), Pacific Legal Foundation respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioner. Petitioner has filed a general consent to the filing of amicus briefs in this case. Respondent has not responded to Pacific Legal Foundation's request for consent.[1]

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. PLF actively engages in research and litigation nationwide over a broad spectrum of public interest issues. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation has created its Free Enterprise Project. The Project seeks to protect the free enterprise system from abusive regulation, a civil justice system that grants excessive liability awards, and barriers to the freedom of contract. Because of its history and expertise with regard to civil rights litigation and economic freedom, PLF believes its perspective will aid this Court in considering this case.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

For all the foregoing reasons, the motion of Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: January, 2006.

Respectfully submitted,

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QUESTION PRESENTED

Whether an employer may be held liable for retaliatory discrimination under Title VII for any "materially adverse change in the terms of employment" (including a temporary suspension rescinded by the employer with full back pay or an inconvenient reassignment, as the court below held); for any adverse treatment that was "reasonably likely to deter" the plaintiff from engaging in protected activity (as the Ninth Circuit holds); or only for an "ultimate employment decision" (as two other courts of appeals hold).

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INTRODUCTION AND SUMMARY OF ARGUMENT

Claiming insubordination, Sheila White's immediate supervisor immediately suspended her without pay. As part of the collective bargaining agreement with the union that represents White, she was permitted to file a grievance alleging that the suspension was unwarranted. White employed this procedure and, after investigation, White's employer, Burlington Northern and Santa Fe Railway Company, concluded that White should not have been suspended. White was reinstated to her job and received backpay. In White's subsequent lawsuit brought pursuant to Title VII, she alleged that the suspension was an "adverse employment action" in retaliation for her earlier claim of discrimination.

Whichever language this Court adopts to define "adverse employment action," it should not include temporary, interim decisions subsequently corrected by the employer when the employee is made whole through the standard remedies of reinstatement and backpay.[2] Supervisors must have the ability to remove an insubordinate employee from duty pending an investigation. Where, as here, the employee had full access to an internal grievance process and that process results in reinstatement and backpay—corrective action by the employer that makes the employee whole—the Court should find that the temporary inconvenience of the waiting through the investigative process does not rise to the level of an adverse employment action sufficient to sustain a retaliation cause of action.

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[2] Amicus does not address White's claims about the changes in her job duties.

ARGUMENT

I

A TEMPORARY SUSPENSION, FOLLOWED BY REINSTATEMENT AND BACKPAY, IS NOT AN ADVERSE EMPLOYMENT ACTION

A. Suspension Is an Employer's Appropriate Response to an Employee's Perceived Insubordination

Insubordination is a serious offense. Black's Law Dictionary defines it as

> 1. A willful disregard of an employer's instructions, esp. behavior that gives the employer cause to terminate a worker's employment. 2. An act of disobedience to proper authority; esp., a refusal to obey an order that a superior officer is authorized to give.

Black's Law Dictionary (8th ed., 2004). "There is no more elementary cause for discharge of an employee than disloyalty to his employer." *NRLB v. Local Union No. 1229, Intern. Broth. of Elec. Workers*, 346 U.S. 464, 472 (1953). "An employer is likely to treat insubordination more harshly than most other forms of employee misconduct, . . . because of the threat to workplace discipline." *Bean v. Wisconsin Bell, Inc.*, 366 F.3d 451, 453 (7th Cir. 2004).

At a minimum, insubordination generally provides just cause for immediate suspension. *See, e.g., Town of Dedham v. Civil Service Com'n*, 21 Mass. App. Ct. 904, 907, 483 N.E.2d 836, 838 (Mass. App. 1985) (approving 18-month suspension for insubordination); *Procida v. Grinker*, 154 A.D.2d 290, 291 546 N.Y.S.2d 367 (N.Y.A.D. 1 Dept. 1989) (affirming 80-day suspension for insubordination); *Brennan v. Department of Health and Human Services*, 787 F.2d 1559, 1563-64 (Fed. Cir.

1986) (60-day suspension for insubordination). Insubordination takes on even greater significance when there are safety concerns, as is obvious in the maintenance of a railroad track. *Cf., Kelliher v. Veneman*, 313 F.3d 1270, 1277 n.9 (11th Cir. 2002) (United States Department of Agriculture food inspector's termination for insubordination was reasonable, and not a violation of the Whistleblower Protection Act and not retaliation, where the employee's neglect of duty specifications went to heart of USDA's mission to ensure that unwholesome food products do not enter the marketplace). A supervisor who perceives an employee to be insubordinate must have the ability to remove that person from duty.

If an employer perceives insubordinate behavior, the employer need not wait to be 100% certain of the employee's failure before taking steps to remove the danger from the operation. *See, e.g., Connick v. Myers*, 461 U.S. 138, 151-52 (1983) ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."). No public policy suggests that employee-litigants are entitled to preferential treatment in this regard.

B. An Internal Grievance Procedure Is the Best Mechanism for an Employee to Challenge a Suspension

This Court previously recognized the value of internal grievance procedures. Under *Faragher v. City of Boca Raton*, 524 U.S. 775, 763 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 807 (1998), an employee's claim fails if she does not make reasonable use of the employer's grievance procedures. Utilizing these procedures rather than proceeding directly to court is consistent with the legislative requirement that complainants seek permission from the EEOC to sue. *See Martini v. Federal National Mortgage Association*, 178 F.3d 1336, 1338 (D.C. Cir. 1999) (remanding to district court with

instructions to dismiss plaintiff's suit as untimely because "Title VII requires complainants to wait 180 days before suing in federal court so that the commission may informally resolve as many charges as possible."), *cited in Taylor v. Small*, 350 F.3d 1286, 1294 (D.C. Cir. 2003). Thus, both Congress and the courts recognize the value of informal resolution and contemplate delays in resolution far beyond the 37 days of White's interim suspension that ultimately was resolved in her favor.

The approval shown to a company's internal grievance procedures is analogous in purpose to the judicial doctrine requiring exhaustion of administrative remedies.

> The exhaustion doctrine also acknowledges the commonsense notion of dispute resolution that an agency ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.

McCarthy v. Madigan, 503 U.S. 140, 145 (1992). Exhaustion serves another purpose as well: it promotes judicial efficiency. "When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *Id.*

C. Reinstatement with Backpay Is the Standard Remedy for an Unwarranted Suspension

What if White had, in fact, been insubordinate? Immediate suspension without pay is the standard employer response and an appropriate one. If she *had* been insubordinate, the internal grievance procedure would have revealed as much and White would have been terminated, with no entitlement to her pay during the time of her suspension. Because it would be, as both a practical and legal matter, impossible to recover wages paid during a suspension, statutes and courts authorize

backpay as the alternative to an employee continuing to receive wages during a suspension.

"The guiding principle underlying the award of backpay is that [employees] must be made whole for the losses that they have suffered by reason of the employer's unfair labor practice." *Cont'l Ins. Co.*, 289 N.L.R.B. 579, 583 (1988). An award of backpay is intended to make whole the victim of discrimination. *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). A backpay order is a means to "restore the situation 'as nearly as possible, to that which would have obtained but for the illegal discrimination.'" *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 798 (4th Cir. 1998) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)); *Aneco Inc. v. NLRB*, 285 F.3d 326, 329 (4th Cir. 2002) (backpay serves as a "compensatory, make-whole remedy"). Thus, backpay is classified as restitution, *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir. 1995), and there is a strong presumption in favor of backpay awards to victims of employment discrimination. *Abermarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975). Backpay is an appropriate remedy both for a sexual harassment discrimination claim and for a retaliation claim. *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 873-74 (7th Cir. 1995); *General Teamsters Local No. 162 v. NLRB*, 782 F.2d 839, 844 (9th Cir. 1986) (reinstatement and backpay are conventional remedies under the Act); *see also* 42 U.S.C. § 2000e-5(g).

White's 37-day suspension for insubordination pending an investigation into the matter represented an employer's internal procedures working precisely as they were intended. White did not suffer for having pursued the procedures—she prevailed. Once the suspension was found to be unwarranted, White was eligible for and did receive the standard remedies to make her whole. The five-week wait until the matter concluded is too narrow a pedestal to bear the weight of a retaliation claim.

II

PUBLIC POLICY FAVORS A NARROWER DEFINITION OF "ADVERSE EMPLOYMENT ACTION" FOR RETALIATION CLAIMS

It is not difficult for a duplicitous employee to "set up" an employer for a retaliation claim.[3] An employee can make an unfounded complaint that her employer discriminated against her. Perhaps especially because the complaint *was* unfounded, the employer reacts emotionally or angrily. The employee now has a legitimate claim for retaliation because there is no requirement that a plaintiff prevail on an underlying discrimination claim to win the day on a retaliation cause of action. Wendy Hyland, *Equal Opportunity for Employers: Elevating the Adverse Employment Action Standard to Allow Only Meritorious Retaliation Claims*, 90 Ky. L. J. 273, 276-77 (2002); Douglas E. Ray, *Title VII Retaliation Cases: Creating a New-Protected Class*, 58 U. Pitt. L. Rev. 405, 407 (1997) ("because an employee challenging employment practices under Title VII can be protected whether or not the opposed practices actually violate Title VII, retaliation cases substantially expand Title VII coverage. Moreover, coverage has been extended by cases protecting former employees from retaliation months and even years after separation.").

The more broadly defined the adverse employment action is, the easier it is for a disgruntled employee to leverage an

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[3] Not all employers are evil; not all employees are virtuous. And vice versa. It is an unfortunate fact that individuals who find themselves in an adversarial stance with colleagues may make unfounded claims. *See, e.g., Monteiro v. Poole Silver Co.*, 615 F.2d 4, 8 (1st Cir. 1980) (In response to a plaintiff who "decided that the best defense to correction from the supervisor was a strong offense," "Section 704(a) is similarly unavailable to protect an employee who makes unfounded claims of discrimination in order to excuse non-compliance with legitimate employer demands.").

unmeritorious initial claim into a successful collateral claim. This is particularly so where the juries tend to sympathize with employees more than employers under most all circumstances.

While employees do need some protection from unfair treatment as a result of a bona fide objection to employer policies, recognizing any subsequent conduct as potentially retaliatory invades the province of the employer/employee relationship. *See* Stephanie Armour & Barbara Hansen, *Flood of 'Retaliation' Cases Surfacing in U.S. Workplace*, USA Today, Feb. 10, 1999, at 1A. Making employers subject to a section 704(a) suit for any action that an employee may find unfair is an undue burden on employers by forcing them to police their every action once an employee has opposed one of its policies or has filed a complaint with the EEOC. Vicky Ramsey Conwell, *Bosses' Retaliation Bringing Lawsuits*, Atlanta J. & Const., Aug. 1, 1999, at 1R. Allowing employers to develop their own policies and procedures to govern relationships with employees following an objection to discriminatory behavior encourages amicable relations pending the proceeding. At the same time, the courts are available if the employer should engage in behavior beyond the scope of its policy. Hyland, *Equal Opportunity for Employers*, 90 Ky. L. J. at 286.

The greater the gulf between a valid cause of action under Section 703 (discrimination) and Section 704 (retaliation), the more incentive exists to encourage unhappy employees to allege a discrimination claim as a means of setting up a much more broadly defined retaliation claim. There should be closer parity between the two sections to reduce the risk of litigious gamesmanship. Thus, this Court should reject the EEOC and Ninth Circuit calls for an extremely broad definition of "adverse employment action" as anything that might "deter protected activity," even when the employee cannot point to any tangible economic impact of the employer's alleged retaliation.

From the perspective of an employee, who already feels vulnerable having filed a complaint, virtually any negative feedback may be perceived as related to the protected complaint. *Id.* at 290-91. For example, in *Tran v. Trustees of the State Colleges in Colorado*, 355 F.3d 1263 (10th Cir. 2004), an employee (Ms. Tran) made a claim of sexual harassment. In response, the employer increased the amount of supervision over the employee. The employee complained that she was being too closely supervised such that her working conditions had become intolerable. But the court found that

> In light of Ms. Tran's prior complaints that other employees were sexually harassing her or engaging in other inappropriate behavior, as well as her prior complaint that Ms. Hanna did not pay enough attention to her during the period when Ms. Hanna was her supervisor, it was reasonable to expect closer monitoring by Ms. Doyle to ensure that Ms. Tran received adequate supervision and was not subjected to inappropriate behavior by other employees.

Id. at 1271. Nonetheless, Ms. Tran did not view Ms. Doyle's actions in this light, felt distressed by the situation, and cited the close supervision as a reason for leaving her employment and filing a claim of constructive discharge. *Id.*

The very broad standard adopted by the EEOC and Ninth Circuit demands that, as a practical matter, courts will be required to intrude into day-to-day management decisions in a way that usually has been condemned by this Court and other lower courts. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978), where this Court explicitly admonished the courts against becoming personnel managers and warned of "the dangers of embarking on a course . . . where the court requires businesses to adopt what it perceives to be the 'best'" employment practices.; *see also Bienkowski v. Am. Airlines,*

Inc., 851 F.2d 1503, 1507-08 (5th Cir. 1988) (holding that "[employment discrimination laws were] not intended to be a vehicle for judicial second-guessing of employment decisions, nor . . . to transform the courts into personnel managers"); *Dale v. Chic. Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986) (stating that the court "does not sit as a super-personnel department that reexamines an entity's business decisions"); *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982) (explaining that employment discrimination laws do "not authorize the courts to judge the wisdom of a corporation's business decisions"); Cathy Currie, *Note, Staying on the Straighter and Narrower: A Criticism of the Court's Definition of Adverse Employment Action Under the Retaliation Provision of Title VII:* Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000), 42 S. Tex. L. Rev. 1323, 1344 (2002).

> A spectrum this broad is grossly unfair to employers who must handle internal office politics and have a reasonable opportunity to protect their interests from a disgruntled employee. The consequence of such a wide array of potential liability hinders the ability of employers to effectively manage employees, inciting fear of retaliation if a manager gives a poor evaluation to an employee. In addition, employees receive a halo of protection after they have complained about alleged unlawful discrimination that may be unjustified, particularly since liability for these alleged practices has yet to be established.

Hyland, *Equal Opportunity for Employers*, 90 Ky. L. J. at 291. Moreover, as retaliation claims are brought in increasing numbers as permitted by an expansive definition of "adverse employment action," there is a risk that serious claims might be buried among the trivial. Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses?—Unlawful Retaliation Under Title VII Following Mattern: Will Courts Know It When They See It?*, 14 Lab. Law. 373, 410 (1998).

On the other hand, if the employee is not trying to set up the employer, and is genuinely distressed by perceived discrimination and wants to work to rectify it within the workplace, reconciliation between employer and employee is more likely to occur if the matter is resolved in more informal proceedings. "Courts have emphasized that Congress intended to encourage employers and employees to conciliate rather than litigate their grievances involving discrimination within the workplace." Ann M. Henry, *Comment, Employer and Employee Reasonableness Regarding Retaliation Under the Ellerth/Faragher Affirmative Defense*, 1999 U. Chi. Legal F. 553, 568 (1999). Once the employment relationship becomes fodder for litigation, with dueling discovery, supervisors and coworkers reluctantly deposed, and all the adversarial trappings of the judicial system, both sides are likely to incur high costs in money and acrimony. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 1031-32 (1991) ("[a] souring of the employment relationship[] militates against litigation . . . . In most cases, litigation is a viable option only when the employment relationship has been broken off."). *See also* Shannon Vincent, *Comment, Unbalanced Responses to Employers Getting Even: The Circuit Split Over What Constitutes a Title VII-Prohibited Retaliatory Adverse Employment Action*, 7 U. Pa. J. Lab. & Emp. L. 991, 996 (2005) (noting the price paid in high litigation costs and overbroad employer liability). How much more efficient and productive if the dispute is promptly resolved, the employee made whole through the standard, appropriate remedies, and the employment relationship resumed. "The purposes of Title VII are best served when parties, where possible, attack discrimination within the context of their existing employment relationships." *Edwards v. Occidental Chemical Corp.*, 892 F.2d 1442, 1449 (9th Cir. 1990); *E.E.O.C. v. L.B. Foster Co.*, 123 F.3d 746, 755 (3rd Cir. 1997); *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 342-43 (10th Cir. 1986); *Clark v. Marsh*, 665 F.2d

1168, 1173 (D.C. Cir. 1981); *Bourque v. Powell Electrical Manufacturing Co.*, 617 F.2d 61, 65-66 (5th Cir. 1980).

These policy considerations motivated the courts in several cases in which temporary setbacks, subsequently corrected, do not rise to the level of an adverse employment action. These include:

- *Shohadaee v. Metropolitan Government of Nashville and Davidson County*, 150 Fed. Appx. 402, 405 (6th Cir. 2005) (" [a]lthough Plaintiff was initially denied tenure, she was given another opportunity to prove herself. During that year, she did not lose any income or benefits. She does not contend that the terms and conditions of her employment materially changed. Plaintiff is no worse off with respect to seniority, income, or benefits having been granted tenure after her fourth year rather than after her third year.").

- *Taylor v. Small*, 350 F.3d 1286, 1293-94 (D.C. Cir. 2003) (holding that an employer can cure an otherwise adverse employment action before the action becomes a subject of litigation and adopting the district court's reasoning: "Permitting employers the opportunity to correct workplace wrongs prior to litigation is the objective of the EEO process. If a plaintiff were permitted a right to sue even if his or her employer had corrected the grievance, there would be absolutely no incentive for employers to make adjustments for past conduct during the EEO process.").

- *Brooks v. City of San Mateo*, 229 F.3d 917, 929-30 (9th Cir. 2000) (with regard to a withdrawn negative performance evaluation, the court held: "Nevertheless, the evaluation here was not an adverse employment action because it was subject to modification by the city. Brooks refused to accept the review and appealed, but she abandoned her job while the appeal was pending. Because

the evaluation could well have been changed on appeal, it was not sufficiently final to constitute an adverse employment action." Moreover, when Brooks complained about her assigned shift and that her vacation preferences had been denied, the employer reversed course, changed her shift, and granted the requested vacation time. Thus, the delay in obtaining the favored shift and vacation time were not adverse employment actions.).

- *Dobbs-Weinstein v. Vanderbilt University*, 185 F.3d 542, 546 (6th Cir. 1999) (with regard to a tenure decision delayed for a year, the court held: "Dobbs-Weinstein succeeded in the grievance process, and Vanderbilt's final decision was to grant her tenure. She has not here suffered a final or lasting adverse employment action sufficient to create a prima facie case of employment discrimination under Title VII. To rule otherwise would be to encourage litigation before the employer has an opportunity to correct through internal grievance procedures any wrong it may have committed.").

- *Stewart v. Evans*, 275 F.3d 1126, 1135-36 (D.C. Cir. 2002) (attempt to obstruct federal employee's award nomination was not an adverse employment action because the employee eventually received the award; further, delay in plaintiff's seeking appointment was not actionable retaliation. In rejecting the employee's claim because she ultimately obtained every workplace advantage that she wanted, the court noted: "Title VII does not provide relief for victims of attempted retaliation.").

- *Amro v. Boeing Co.*, 232 F.3d 790, 797-98 (10th Cir. 2000) (finding that mere delay in granting the plaintiff's desired transfer did not constitute an adverse employment action even though it meant plaintiff had to continue working under supervisor who allegedly harassed him

because plaintiff failed to show any other negative or unfavorable effect of that delay).

- *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 587-89 (11th Cir. 2000) (finding that the assignment of professor to teach more credit hours than other professors and to teach classes on three different campuses during one session was not adverse employment action because the assignment was a mistake and it was promptly corrected so that employee never suffered any actual consequences; further, threatened letters that were never actually written did not meet threshold level of substantiality necessary to be cognizable under the antiretaliation clause. The court held: "A proposed action that is corrected as soon as the proper official is made aware of it and before it goes into effect, so that the employee does not actually suffer any consequence, is not 'adverse.'").

The common thread in these cases is that workplaces "are rarely idyllic retreats." *Blackie v. Maine*, 75 F.3d 716, 725 (1st Cir. 1996). Instead, they are "complex environments in which decisions are made by a variety of people for a variety of reasons." Ann Clarke Snell & Lisa R. Eskow, *What Motivates the Ultimate Decisionmaker? An Analysis of Legal Standards for Proving Causation and Malice in Employment Retaliation Suits*, 50 Baylor L. Rev. 381, 382 (1998). Because of the nature of the workplace, the multi-faceted decisionmaking, and the expressed judicial desire to let errors be corrected prior to litigation, an employer ought to be able to use the standard practice of suspension/investigation/reinstatement with backpay in response to alleged insubordination. This is so regardless of whether the employee previously exercised a protected right. An employer should not be "paralyzed into inaction once an employee has lodged a complaint under Title VII, making such a complaint tantamount to a 'get out of jail free' card for employees engaged in job misconduct." *Brooks*, 229 F.3d 917 at 928.

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be *reversed*.

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Respectfully submitted,

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